

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation  
of the

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING

v.

ACOSTA TACOS, a business entity form  
unknown, also known as JAIME ACOSTA dba  
ACOSTA TACOS, also known as JESUS L.  
ACOSTA, dba ACOSTA TACOS, also known as  
TACOS ACOSTA,

Respondents.

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MARINA CHAVEZ,

Complainant.

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Case No.

E-200708 T-0097-00se

C 08-09-017

09-03-P

DECISION NUNC PRO TUNC

The Fair Employment and Housing Commission amends its June 19, 2009 decision adopting the proposed decision in this matter *nunc pro tunc*. The Commission designates the decision as precedential on the basis of the holding that breastfeeding is an activity intrinsic to the female sex. Accordingly, termination in violation of complainant's right to return to work from pregnancy disability leave because she was still breastfeeding was discrimination on the basis of sex, a violation of Government Code sections 12940, subdivision (a), and 12945, subdivision (a). (Gov. Code § 12935, subd. (h); Cal. Code Regs., tit. 2, § 7435, subd. (a).)

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: June 19, 2009

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PATRICIA PEREZ

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CAROL FREEMAN

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STUART LEVITON

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LINDA NG

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Respondents.

MARINA CHAVEZ,

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C 08-09-017

09-03-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it as precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a).

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: June 16, 2009

PATRICIA PEREZ

LINDA NG

CAROL FREEMAN

STUART LEVITON

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

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ACOSTA TACOS, a business entity form  
unknown, also known as JAIME ACOSTA  
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JESUS L. ACOSTA, dba ACOSTA TACOS,  
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MARINA CHAVEZ,

Complainant(s).

Case No.

E200708 T-0097-00se

C 08-09-017

PROPOSED DECISION

This matter was heard by the Fair Employment and Housing Commission on November 24, 2008, and April 15, 2009, in Los Angeles, California. At the November 24, 2008 hearing, Administrative Law Judge Joseph Ragazzo presided. Respondents Jamie Acosta and Jesus Acosta appeared telephonically. Judge Ragazzo admitted the Department of Fair Employment and Housing's pleading file, accepted the telephonic appearances of respondents Jamie Acosta and Jesus Acosta, and thereafter continued the matter. Administrative Law Judge Ann M. Noel presided at the April 15, 2009 hearing.

At both hearings, Alexandra Seldin, Staff Counsel, represented the Department of Fair Employment and Housing. Associate Chief Counsel Gregory Fisher attended as an observer throughout. Staff Counsel Phoebe Liu attended as an observer the first day of hearing. At the April 15, 2009 hearing, respondent Jaime Acosta appeared, on behalf of himself and all other respondents. Complainant Marina Chavez attended both days of hearing. Renamai Lopez and Rosemary Mezza served as Spanish – English interpreters, on the first and second days of hearing, respectively. The Commission received the final hearing transcript in this matter on May 4, 2009, and the case was submitted on that date.

After consideration of the entire record, Administrative Law Judge Ann M. Noel makes the following findings of fact, determination of issues, and order.

## FINDINGS OF FACT

1. On September 5, 2007, Marina Chavez (complainant or Chavez) filed a written, verified complaint with the Department of Fair Employment and Housing (DFEH) against Acosta Tacos. The complaint alleged that Chavez's former employer, Acosta Tacos, had terminated her employment when she returned to work after a pregnancy disability leave, in violation of the Fair Employment and Housing Act, Government Code section 12900, et seq. (the Act or FEHA).

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h), of the FEHA. On September 3, 2008, Phyllis Cheng, in her official capacity as Director of the DFEH, issued an accusation against Acosta Tacos (Acosta Tacos) which alleged that the company had discriminated against Chavez in violation of the FEHA. Specifically, the DFEH alleged, Acosta Tacos failed to return Chavez to her original or a comparable position after she took a pregnancy disability leave, in violation of Government Code section 12945, subdivision (a); terminated or otherwise discriminated against Chavez on the basis of her sex, in violation of Government Code section 12940, subdivision (a); and retaliated against Chavez because of her pregnancy and/or exercising her right to take a pregnancy disability leave, in violation of Government Code section 12940, subdivision (h). The DFEH also alleged that respondents failed to take all reasonable steps to prevent discrimination by failing to provide Chavez notice of her right to take a pregnancy disability leave or to post proper notice of the pregnancy disability leave law; in violation of Government Code section 12940, subdivision (k).

3. On November 21, 2008, the DFEH issued an amended accusation naming "Acosta Tacos, a business entity form unknown, also known as Jaime Acosta dba Acosta Tacos (Jaime Acosta or Acosta), also known as Jesus L. Acosta (Jesus Acosta), dba Acosta Tacos, also known as Tacos Acosta," as respondents in this matter, but otherwise re-alleging the same charges as the original accusation.

4. Acosta Tacos is a chain of taquerias selling tacos and other Mexican food at three locations in the greater Los Angeles area: on West Imperial Highway, North La Brea Avenue, and South Prairie Avenue. Acosta Tacos is a sole proprietorship owned by Jesus Acosta, who is doing business as (dba) Acosta Tacos. Her son, Jaime Acosta, is one of the managers of Acosta Tacos, with the authority to hire and fire employees. His brother, Julian Acosta, also works for Acosta Tacos as a manager. At all times relevant, Acosta Tacos employed from 20 to 30 employees and was an "employer," within the meaning of Government Code sections 12926, subdivision (d), 12940, subdivisions (a), (h) and (k), and 12945, subdivision (a).

5. On or about October 24, 2004, Jaime Acosta hired Chavez to work at Acosta Tacos as a cashier, working at two of its taquerias. Chavez, then 25, had grown up in Los Angeles, had a middle school education, was fluent only in Spanish, and was a mother of three children, then aged 10, 8 and 7 years.

6. Chavez initially earned \$6.75 per hour, working 32 hours per week, four days a week. Chavez worked the swing shift, from 5 p.m. to 2 a.m. Chavez also regularly worked three to four hours of overtime a week. At some time unspecified in the record, Acosta Tacos raised Chavez's pay to \$7.55 per hour. Chavez worked Monday nights at the North La Brea Avenue location, supervised by Francisco Alvarez. On Wednesday, Friday and Saturday nights, Chavez worked at the West Imperial Highway location, supervised by Santiago Rodriguez. Chavez's average weekly pay was \$286.90.

7. Acosta Tacos provided its employees, including Chavez, with one week of paid vacation per year, which was forfeited if not used during the year it was accrued. Acosta Tacos provided no other benefits.

8. In October 2006, Chavez learned that she was pregnant with her fourth child, by her partner, Misael Nuñez Acosta (Nuñez Acosta). The baby was due at the end of May 2007. In November or December, 2006, Chavez notified Jaime Acosta that she was pregnant, providing him with a doctor's note about her pregnancy. Acosta told her to let him know when she was due so that he could find someone else to take her shifts.

9. On April 30, 2007, approximately a month before Chavez's childbirth due date, she went into labor. Chavez telephoned and spoke with respondent Jaime Acosta telling him that she was going to have her child that day. Acosta approved her leave and asked her to call him when she was able to return to work. Chavez delivered her son later that day and thereafter was on pregnancy disability leave.

10. On May 30, 2007, Chavez called Jaime Acosta to tell him that she was ready to return to work. Acosta told her that he had filled her position but that he would try to find her another position. While Chavez was on leave, Acosta had hired two employees to work Chavez's shifts.

11. On June 1, 2007, Jaime Acosta called Chavez and asked her to work the swing shift to cover for an absent employee at the Acosta Tacos' North La Brea Avenue taqueria. Chavez worked that night from 5 p.m. to midnight. Acosta did not require Chavez to provide medical certification that she was ready to return to work. During Chavez's half hour lunch break, her partner Nuñez Acosta met Chavez at her work place with their premature, newborn baby. Chavez nursed the baby in their car during her lunch break and then went back to work.

12. On June 2, 2007, Santiago Rodriguez, supervisor of Acosta Tacos' West Imperial Highway taqueria, called Chavez to work the swing shift that night. Chavez agreed and reported for work at 5 p.m.

13. Approximately half way through her June 2, 2007 shift, Jaime Acosta called supervisor Santiago Rodriguez at the West Imperial Highway taqueria and asked him who was working with him on that shift. When Rodriguez informed him that Chavez was working, Acosta objected, saying that there were other people that Rodriguez could have called. Acosta asked to speak with Chavez. In their telephone conversation on June 2, 2007, Acosta told Chavez that he did not want her working there. Chavez asked Acosta why. Chavez responded that he was "the owner and [he] could do as [he] pleased because [he] was the one who gave the orders." Acosta told her that he had learned that Chavez had breastfed her baby the prior night during her break and he stated that she could not breastfeed during her breaks. Acosta told her that he would call her back to work once she ceased lactation. Chavez objected that she needed her job back immediately and could not wait until she stopped breastfeeding. Acosta told her that if that was her attitude and response, he could no longer use her and fired her.

14. At a date unspecified in the record, Acosta Tacos paid Chavez for her June 1 and 2, 2007 shifts. Acosta Tacos did not pay Chavez for the one week vacation that she had accrued.

15. Chavez was extremely upset to lose her job. She called her partner Nuñez Acosta to pick her up from work on June 2, 2007, and was crying so hard, he could barely understand what she was saying.

16. As a result of losing her job, Chavez cried frequently, worried about how she would support her family without her income. She argued frequently with Nuñez Acosta over their diminished finances and also with her older children, who asked for things that she could no longer provide without the income from her job. Chavez's physical relationship with Nuñez Acosta suffered. She developed insomnia, intense headaches, and other signs of stress. Chavez sought medical attention from her doctor to deal with her stress and its physical effects on her body.

17. Chavez's distress at losing her job continued through the date of hearing. She had considered respondents as part of her family. Indeed, her partner, Nuñez Acosta, was related to Jaime Acosta and Jesus Acosta and both Chavez's father and sister had been previously employed by Acosta Tacos.

18. Chavez needed her job to support her family and she diligently looked for other jobs at other taquerias as well as pizzerias. She was unsuccessful finding other work, in part because she needed to work the night shift so that she could share child care with her partner and other family members available for child care at night but not during the day. Chavez

and Nuñez Acosta had to take loans and accept assistance from their families to meet their expenses, and were provided boxes of food from their church.

19. Approximately once a month, Chavez assisted a neighbor in her housecleaning job, earning \$60 per day for her labor. To the date of hearing, Chavez held no other employment.

20. Acosta Tacos maintained a pregnancy disability leave policy set out in a document entitled “Terms of Employment.” That document stated that Acosta Tacos would provide a pregnancy disability leave as specified by California or federal law, without any further details. At no time did Acosta Tacos provide any information to Chavez regarding pregnancy disability leave, nor did it give her a copy of the Terms of Employment.

21. Acosta Tacos did not have any DFEH posters posted at its taquerias informing its employees of their right to take pregnancy disability leave and return to their original jobs at the completion of that leave or their right to be free from discrimination because of their sex.

## DETERMINATION OF ISSUES

### Liability

The DFEH alleges that respondents discriminated against Chavez based on her sex by failing to return Chavez to her original or a comparable position after she took a pregnancy disability leave; by terminating or otherwise discriminating against Chavez on the basis of her sex (pregnancy or related medical condition); and by retaliating against Chavez because of her pregnancy and/or exercising her right to take a pregnancy disability leave; in violation of Government Code sections 12940, subdivisions (a) and (h), and 12945, subdivision (a). The DFEH further charges that respondent Acosta Tacos failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k), by failing to provide Chavez notice of her right to take a pregnancy disability leave or to post proper notice of the pregnancy disability leave law. Respondents dispute each of these charges.

#### A. Failure to Reinstate

##### 1. Right to Pregnancy Disability Leave

The Fair Employment and Housing Act requires an employer to provide a pregnancy disability leave of up to four months to a female employee while she is disabled on account of pregnancy, childbirth or related medical conditions. (Gov. Code § 12945, subd. (a); Cal. Code of Regs., tit. 2, § 7291.7, subd. (a); *Cal. Fed. Savings & Loan Ass’n v. Guerra* (1987) 479 U.S. 272; *Dept. Fair Empl. & Hous. v. J.E. Robinson, D.D.S.* (Feb. 16, 1993) No. 93-02,



FEHC Precedential Decs. 1992-93, CEB 2, p. 9, [1993 WL 726824 (Cal.F.E.H.C.)], *affd.* *J.E. Robinson v. Fair Empl. & Hous. Com.* (1992) 2 Cal. 4th 226; *Dept. Fair Empl. & Hous. v. Wal-Mart Stores, Inc.* (June 7, 2005) No. 05-04-P, 2005 WL 1703228 (Cal.F.E.H.C.); *Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc., aka Stone Companies*, (Oct. 22, 1999) No. 99-11, FEHC Precedential Decs. 1999, CEB 3, p. 7 [1999 WL 1276682 (Cal.F.E.H.C.)].)

Chavez's pregnancy disability leave from work began on April 30, 2007, when she began early labor and notified Jaime Acosta of her impending childbirth. She was ready to return to work on May 30, 2007, one month later. The record established that this period of leave was a result of Chavez's disability due to pregnancy, and that her employer Acosta Tacos was on notice of both the leave and Chavez's return date.

The DFEH thus established that Chavez was disabled on account of pregnancy and was entitled to pregnancy disability leave from April 30 to May 30, 2007.

## 2. Right to Return to Same Position

On completion of an employee's pregnancy disability leave, the employer is under a legal duty to reinstate that employee to her job, the same position that employee had held before her leave. (Cal. Code Regs., tit. 2, § 7291.9.) The employer will be held in violation of the FEHA for failing to reinstate an employee after her pregnancy disability leave unless it can establish an affirmative defense. (*Dept. Fair Empl. & Hous. v. Wal-Mart Stores, Inc.*, *supra*, 2005 WL \*1703228; *Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc.*, *supra*, 1999, CEB 3, at p. 5.)

An employer is obligated to reinstate an employee who has taken a pregnancy disability leave to her original position unless the employer can show either, that the employee would not otherwise have been employed in her same position at the time reinstatement is requested for legitimate business reasons unrelated to the employee taking a pregnancy disability leave (such as a layoff pursuant to a plant closure) (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(A)); or, second, that each means of preserving the job or duties for the employee (such as leaving it unfilled or filling it with a temporary employee) would substantially undermine the employer's ability to operate the business safely and efficiently. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1)(B).) The burden is on the employer to establish these defenses by a preponderance of the evidence. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(1).) If either of these defenses is shown, the employer must return the employee to a "substantially similar job" if such a job exists. (Cal. Code Regs., tit. 2, § 7291.9, subd. (c)(2).)

On May 30, 2007, when Chavez notified Jaime Acosta that she was ready to return to work, he notified her that he had filled her position with two other employees. Nonetheless, he told her that he would look for another position for her, and called her back into work on June 1, 2007 to substitute for an absent employee. But the next day, when her supervisor at the Imperial taqueria, Santiago Rodriguez, asked her to work a shift, Acosta made it clear

both to Rodriguez and to Chavez that he had not authorized her to return to work and would do so only when he deemed her ready to return, once she had ceased lactation. When she objected that she needed her job back immediately, he told her that he did not like her attitude, could no longer use her, and terminated her employment. To the date of hearing, Acosta Tacos had not called Chavez back to work.

Respondents made no showing at hearing that Chavez's position was eliminated for business reasons unrelated to her pregnancy disability leave and thus she could not be reinstated. To the contrary, the record established that Chavez's position as a swing shift cashier at Acosta Tacos continued to exist after Chavez was medically released to return to work when she sought reinstatement to her job and that respondents had filled the position with two new employees.

Accordingly, the DFEH established that Chavez was entitled to be reinstated to the same position she held before her leave, but Jaime Acosta, a manager acting for Acosta Tacos, refused to reinstate her. The evidence in this case established that respondent Jesus L. Acosta was the sole owner of Acosta Tacos and dba Acosta Tacos. As Chavez's employer, Jesus Acosta is liable for Jaime Acosta's conduct toward Chavez. (Gov. Code, § 12926, subd. (d); *Reno v. Baird* (1998) 18 Cal.4th 640, 647; *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 66.)<sup>1</sup>

In conclusion, Jaime Acosta's conduct, failing to reinstate Chavez after she returned from her pregnancy disability leave, was a violation of the FEHA, Government Code section 12945, subdivision (a) for which Jesus Acosta, as sole owner of Acosta Tacos and dba Acosta Tacos, is liable. (*Dept. Fair Empl. & Hous. v. Wal-Mart Stores, Inc.*, *supra*, 2005 WL \*1703228; *Dept. Fair Empl. & Hous. v. Stone Insurance Services, Inc.*, *supra*, 1999, CEB 3, at p. 5.)

## B. Termination

The DFEH also alleges that respondents discriminated against Chavez based on her sex, in violation of Government Code section 12940, subdivision (a), by terminating Chavez's employment on June 2, 2007. The DFEH asserts that respondents fired Chavez because she had taken a pregnancy disability leave and because she was breastfeeding her newborn baby during her lunch break on June 1, 2007.

Respondents deny any unlawful motives. Respondents claim instead that Acosta Tacos was unhappy with Chavez's job performance prior to her taking her pregnancy

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<sup>1</sup> Government Code section 12926, subdivision (d), defines an "employer," in relevant part, as "any person acting as an agent of an employer, directly or indirectly." This section was intended "to ensure that employers will be held liable if their supervisory employees take actions later found discriminatory." (*Reno v. Baird*, *supra*, 18 Cal.4th at p. 647.) In contrast, supervisors will not be held personally liable for either their discriminatory or their retaliatory acts. (*Reno v. Baird*, *supra*, 18 Cal.4th at p. 663 [no liability for discriminatory acts]; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173-1174 [no liability for retaliatory acts].)

disability leave and her combative tone with Jaime Acosta once she returned convinced him that he no longer wanted her working for Acosta Tacos.

Discrimination by an employer because of pregnancy constitutes discrimination because of sex, under Government Code sections 12926, subdivision (p), and 12940, subdivision (a). (Gov. Code, §§ 12926, subd. (p); 12940, subd. (a); Cal. Code Regs., tit. 2, § 7291.5; *Spaziano v. Lucky Stores, Inc.* (1999) 69 Cal.App.4th 106, 110; *Badih v. Myers* (1995) 36 Cal.App.4th 1289, 1296; *Dept. Fair Empl. & Hous. v. Sasco Electric* (June 22, 2007) No. 07-02-P [2005 WL 5672426 at \*10 (Cal.F.E.H.C.)].) Discrimination because of sex, under Government Code sections 12926, subdivision (p), and 12940, subdivision (a), is established if a preponderance of the evidence demonstrates a causal connection between Chavez's sex and an adverse action taken against her. It need not be shown that Chavez's sex was the dominant cause of her adverse treatment. Intentional discrimination is established if Chavez's sex was at least one of the factors that influenced respondents to act against her. (*Dept. Fair Empl. & Hous. v. Sasco Electric, supra*, 2005 WL 5672426 at p. 10; *Dept. Fair Empl. & Hous. v. California State University, Hayward* (Nov. 9, 1988) No. 88-18, FEHC Precedential Decs. 1988-89, CEB 6 at p. 17 [1988 WL 242650 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Church's Fried Chicken, Inc.* (Aug. 16, 1990) No. 90-11, FEHC Precedential Decs. 1990-91, CEB 5 at p. 10 [1990 WL 312878 (Cal.F.E.H.C.)].)

The DFEH established both direct and circumstantial evidence to support its allegation that Chavez's breastfeeding was a causal factor in Acosta Tacos' decision to terminate Chavez's employment. Chavez, a credible and compelling witness, testified that Jaime Acosta told her that he did not want her working as long as she was breastfeeding. When she objected that she needed her job back immediately, Acosta told her that he did not like her attitude, could no longer use her, and fired her.

While admitting this conversation, including his statement that he did not want Chavez working until she ceased lactation, Jaime Acosta denied that he had terminated Chavez's employment either because she had taken a pregnancy disability leave or because she was breastfeeding. Rather, he asserted that he had been unhappy with Chavez's performance many months before Chavez took her pregnancy disability leave, motivating him to terminate Chavez upon her return from that leave and that Chavez was "disrespectful" in their final conversation about Chavez's breastfeeding.

Respondents asserted that they were unhappy with Chavez's work performance prior to her taking a pregnancy disability leave for two reasons: they assert that, without permission from respondents, Chavez had occasionally in the summer of 2006 brought her children with her to work when she had no child care, leaving them in her car in the parking lot, and several times, near the end of her shift in winter 2006-2007, Jaime Acosta or other Acosta Tacos staff had seen Chavez talking outside with her partner when she should have been inside working. Jaime Acosta stated that based on that, he had planned on letting her go but had not done so until June 2007, nor had he documented his concerns. Finally, he

testified that, she became “irate” when he talked with her on the telephone about her breastfeeding, forcing him to fire her because she was “disrespecting” him.

Jaime Acosta’s testimony about Chavez’s job performance as his stated reason for her firing is not credited. If Acosta was unhappy with Chavez’s job performance, it does not logically follow that he would have continued to allow her to work for many months later rather than reprimanding her or terminating her closer to the months when the deficiencies in her job performance first allegedly occurred. Moreover, Acosta and his brother, Julian Acosta, who also testified about the Chavez’s job performance, gave conflicting, changing testimony regarding the dates and the number of the alleged incidents involving Chavez’s childcare and her talking with Nuñez Acosta.<sup>2</sup> Further, both indicated that Chavez ceased bringing her children to work after the matter was discussed with her at the end of summer 2006, presumably removing this as an issue justifying her termination almost a year later.

The testimony was unequivocal that Acosta fired Chavez after she objected to his suggestion that she delay her return to work until she ceased lactation. Chavez’s breastfeeding, performed on her own break time, is an activity intrinsic to Chavez’s sex, female, and also protected under California law. (Lab. Code § 1030.) While breastfeeding may not be a pregnancy-“related medical condition” qualifying Chavez for additional pregnancy disability leave,<sup>3</sup> Chavez was not asking for leave to breastfeed her newborn baby. Indeed, she presented herself to her employer as no longer disabled by her pregnancy and thus able, and entitled, to return to work immediately following her pregnancy disability leave. (Gov. Code § 12945, subd. (a).)<sup>4</sup> Acosta’s termination of Chavez because she insisted on her return rights, and her right to breastfeed her baby, was termination because of Chavez’s sex, a violation of Government Code sections 12940, subdivision (a), and 12945, subdivision (a). Respondent Jesus Acosta, owner of Acosta Tacos and dba Acosta Tacos, is

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<sup>2</sup> For example, initially Jaime Acosta testified that complainant brought her children to work in the summer of 2006 and then was seen talking outside with her partner in late 2006, early 2007, in the winter. When asked by DFEH counsel, then, if there were no job performance incidents from February 2007 until complainant left on pregnancy disability leave in April 2007, Acosta changed his testimony to state that the incidents occurred right up to the time that complainant went out on leave. Julian Acosta, Jaime Acosta’s brother, first said that the incidents with complainant’s children in her car occurred on two separate occasions, then he stated it happened ten times, and then he stated it happened “every couple of weeks.”

<sup>3</sup> Cf. *Wallace v. Pyro Mining Co.* (W.D.Ky. 1990) 789 F.Supp. 867, 869, aff’d without opinion (6th Cir. 1991) 951 F.2d 351 [“While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not “medical conditions” related thereto.”]; *McNill v. New York City Dept. of Correction* (S.D.N.Y. 1996) 950 F.Supp. 564, 571 [“Neither breast-feeding and weaning, nor difficulties arising there from, constitute such conditions.”].

<sup>4</sup> Even though Chavez was not asking for time to nurse her newborn baby, breastfeeding during her break only, California law requires an employer to allow an employee a “reasonable amount of break time” to accommodate an employee’s breastfeeding. (Lab. Code, § 1030.)

liable for her manager Jaime Acosta's conduct. (Gov. Code § 12926, subd. (d); *Reno v. Baird*, *supra*, 18 Cal.4th at p. 647; *Janken v. GM Hughes Electronics*, *supra*, 46 Cal.App.4th at p. 66.)<sup>5</sup>

### C. Retaliation

The DFEH also asserts that this same course of conduct – Jaime Acosta terminating Chavez when she insisted that she return after her pregnancy disability leave rather than after she ceased lactation – indicated that respondents retaliated against Chavez for her pregnancy or pregnancy-related medical condition and for exercising her right to take a pregnancy disability leave, in violation of Government Code section 12940, subdivision (h), and California Code of Regulations, title 2, section 7291.14. Respondents deny any retaliatory motive for terminating Chavez's employment.

Government Code section 12940, subdivision (h), makes it unlawful for an employer "to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding" brought under the FEHA. (Gov. Code, § 12940, subd. (h); Cal. Code Regs., tit. 2, § 7287.8.) To establish retaliation under the Act, the DFEH must show that Chavez engaged in protected activity, and that respondents subjected her to adverse employment action because of that protected activity. (*Yanowitz v. L'Oréal USA, Inc.* (2005) 36 Cal.4th 1028, 1042; *Gemini v. Fair Empl. & Hous. Com.* (2004) 122 Cal.App.4th 1004, 1018; *Morgan v. Regents of the Univ. of California* (2000) 88 Cal.App.4th 52, 69; and *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476.)

#### 1. Protected Activity

The evidence established that when Jaime Acosta suggested that Chavez delay her right to return from pregnancy disability leave until after she ceased lactation, Chavez opposed this suggestion and instead insisted upon her right to return immediately. A right to return from her pregnancy disability leave once an employee is no longer disabled by her pregnancy is a concomitant part of her right to take such a leave. (Gov. Code § 12940, subd. (a); Cal. Code Regs., tit. 2, § 7291.9, subd. (a).) And, an employee opposing any restriction of her FEHA rights, including the right to take a pregnancy disability leave and return once no longer disabled, is a "protected activity." (Gov. Code § 12940, subd. (h); Cal. Code Regs., tit. 2, §§ 7291.9, subd. (a) and 7291.14, subd. (b).)

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<sup>5</sup> Jaime Acosta, however, as a supervisor rather than an owner, is not personally liable for his discriminatory conduct. (*Reno v. Baird*, *supra*, 18 Cal.4th at p. 663.)

Jaime Acosta, as a supervisor rather than an owner, is not personally liable for his retaliatory acts. (*Jones v. Lodge at Torrey Pines Partnership*, *supra*, 42 Cal.4th at pp. 1173-1174.)

## 2. Adverse Action

An “adverse employment action,” is a “substantial adverse change in the terms and conditions of the plaintiff’s employment” including termination. (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454-1455.) When Chavez insisted on her right to return immediately from her pregnancy disability leave, rather than to wait until she finished lactation, Acosta told her that he did not like her “attitude,” could no longer use her, and fired her. This termination, immediately following Chavez’s insistence on her right to return to work, indicates a retaliatory motive. (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006) 144 Cal.App.4th 1216, 1235 [“Close proximity in time of an adverse action to an employee’s resistance or opposition to unlawful conduct is often strong evidence of a retaliatory motive.”]; *Villiarimo v. Aloha Island Air, Inc.* (9th Cir. 2002) 281 F.3d 1054, 1065 [“[I]n some cases, causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity”].)

This linkage of Chavez’s insistence on her right to return from pregnancy disability leave with an immediate termination thereafter, and Acosta’s admission that Chavez’s insistence was an attitude that justified her termination establishes that Acosta retaliated against Chavez for exercising her right to return from a pregnancy disability leave, a violation of Government Code section 12940, subdivision (h), and California Code of Regulations, title 2, section 7291.14. Jesus Acosta, owner of Acosta Tacos and dba Acosta Tacos, is liable for the retaliatory actions of her manager, Jaime Acosta. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 109, fn. 9.)

### D. Failure to Take All Reasonable Steps

The DFEH alleges that respondents violated Government Code section 12940, subdivision (k), by failing to take all reasonable steps necessary to prevent discrimination from occurring.

The record established that Acosta Tacos had no policy prohibiting pregnancy discrimination and did not provide its employees with any information about their rights to take pregnancy disability leaves and thereafter, return to their jobs. Although Acosta Tacos had a policy which referenced pregnancy disability leaves, it was written in English only and was not shared with respondents’ employees. The record also established that Acosta Tacos did not post posters informing their employees of their employment rights.

Accordingly, on this record, the DFEH established that Jesus Acosta, owner of Acosta Tacos and dba Acosta Tacos, failed to take all reasonable steps necessary to prevent discrimination from occurring, and thereby violated Government Code section 12940, subdivision (k).

## Remedy

Having established that Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos discriminated against Chavez based on her sex in violation of the Act, the DFEH is entitled to whatever forms of relief are necessary to make Chavez whole for any loss or injury she suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant injury, and Jesus Acosta must demonstrate any bar or excuse she asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County Bd. of Supervisors* (Sep. 7, 1983) No. 83-22, FEHC Precedential Decs. 1982-83, CEB 20, pp. 33-34 [1983 WL 36471 (Cal.F.E.H.C.)].)

The DFEH seeks: an order that respondents: (1) cease and desist discriminating against Chavez and all other employees on the basis of sex and/or pregnancy, or any protected basis; (2) pay to Chavez lost wages, lost benefits, and out-of-pocket expenses, plus interest; (3) pay to Chavez compensatory damages for emotional distress, plus interest, (4) pay to the State of California an administrative fine; (5) develop, implement, disseminate, and post a written policy prohibiting pregnancy and sex discrimination in the workplace; (6) conduct sex and pregnancy discrimination prevention training; (7) post the Commission's notices; and (8) such other relief as the Commission deems just and proper.

### A. Make-Whole Relief

#### 1. Back Pay and Benefits

The DFEH seeks an award of back pay to compensate Chavez for her lost wages from the date of her firing through the date of the hearing in this case. Chavez is entitled to receive back pay for the wages she otherwise could have expected to earn but for Jesus Acosta's violations of the Act. (*Donald Schriver, Inc. v. Fair Empl. & Hous. Com.*, *supra*, 220 Cal.App.3d at p. 407.) Jesus Acosta bears the burden to prove any lack of mitigation of wages. (*Parker v. Twentieth Century-Fox Film Corporation* (1970) 3 Cal.3d 176, 181-182.) The DFEH also seeks additional three weeks of pay, representing the one week of vacation that Chavez was due when she was terminated in 2007 and two additional weeks for 2008 and 2009.

The DFEH established that Chavez made diligent efforts to look for other work once Acosta Tacos terminated her after June 2, 2007. Respondents did not present any evidence to the contrary.

Based on the evidence at hearing, this decision finds that Chavez's back pay award is appropriately calculated from June 2, 2007 to the first date of hearing, November 24, 2008, a period of 541 days or 77 weeks, less any earnings accrued within that time period. (Cal. Code Regs., tit. 2, § 7286.9, subd. (a)(1).) The evidence indicated that during this time period, Chavez worked approximately once a month, earning \$60, or approximately \$1020.

In addition, Chavez is entitled to payment for her two weeks of accrued vacation pay that she had earned in 2007 and would have earned in 2008.<sup>6</sup>

Accordingly, this decision awards the sum of \$21,645 as back pay (79 weeks times the weekly rate of \$286.90, i.e., \$22,665, less \$1,020 in earnings). This amount shall be awarded to Chavez, plus 10 percent interest thereon from the date these earnings would have accrued, compounded annually, until paid.

## 2. Compensatory Damages for Emotional Distress

The DFEH asks for damages in the amount of \$20,000 to compensate Chavez for her emotional distress resulting from respondents' discriminatory conduct.

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

At hearing, Chavez credibly and convincingly testified that she was extremely upset at losing her job, crying hysterically after Acosta fired her. Chavez thought of respondents as family. Chavez needed her job to support herself and her family and thus returned to work when her premature baby was merely one month old. Without this job, she worried how her family would survive and she argued frequently with Nuñez Acosta and her children over finances. The stress on her resulted in insomnia and intense headaches. Chavez sought medical attention from her doctor to deal with her stress and its physical effects on her body.

Chavez's partner, Misael Nuñez Acosta, credibly corroborated Chavez's testimony about her distraught emotional state after losing her job. He also testified that their physical relationship greatly suffered as Chavez was too preoccupied and sad about her job loss to devote any attention to their relationship.

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<sup>6</sup> This decision cuts off Chavez's back pay from the first day of hearing, November 28, 2008, rather than the second day of hearing, April 15, 2009, and thus two weeks of accrued vacation, not three, are appropriate.



Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), Jesus Acosta as the owner of Acosta Tacos and dba Acosta Tacos will be ordered to pay to Chavez \$20,000 in damages for Chavez's emotional distress.<sup>7</sup> Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

#### B. Administrative Fine

The DFEH asks that the Commission award an administrative fine against respondents, asserting that such a fine is warranted because respondents' termination of Chavez when she insisted on her right to return to work after taking a pregnancy disability leave was intentional, egregious and in blatant disregard of Chavez's FEHA rights.

To warrant an award of an administrative fine, Government Code section 12970, subdivision (d), requires clear and convincing evidence of "oppression, fraud or malice." (See *Dept. Fair Empl. & Hous. v. Wal-Mart*, *supra*, 2005 WL \*1703228, at pp. 13-14.) "Oppression" is "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." "Malice" includes conduct intended to cause injury or despicable conduct, which is undertaken with a "willful and conscious disregard" of an employee's rights. (Civ. Code, § 3294, subd. (c).) (*Id.*) The specific statutory factors to be considered by the Commission in determining whether to award an administrative fine, include, but are not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of employees; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) An administrative fine is payable to the state's General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, \$150,000 per complainant, per respondent. (Gov. Code, § 12970, subds. (a)(3); (c); and (d).)

Here, the DFEH proved, by clear and convincing evidence, that Acosta Tacos willfully and in conscious disregard of Chavez's rights failed to provide a discrimination and retaliation-free workplace, and to take reasonable steps to prevent such conduct, in violation of the Act. Under the circumstances of this case, an administrative fine of \$5,000 is appropriate. This amount will be awarded against Jesus Acosta, as owner and dba Acosta Tacos, payable to the state's General Fund. (Civ. Code, § 3294, subd. (c), Gov. Code, § 12970, subds. (a)(3); (c); and (d).) Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

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<sup>7</sup> The portion of Chavez's emotional distress attributable to Chavez's having a premature baby is expressly not included in a determination of Chavez's emotional distress damages in this case.

### C. Affirmative Relief

The DFEH's accusation asks that respondents be ordered to: implement policies against sex and pregnancy discrimination and circulate this policy to all employees; implement sex and pregnancy discrimination training for all employees; and display postings as forms of affirmative relief. The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subds. (a) and (a)(5).)

Jesus Acosta, owner of Acosta Tacos and dba Acosta Tacos, will be ordered to: (1) cease and desist from denying any employee her rights to a discrimination-free work environment based on sex or pregnancy; (2) post a notice acknowledging Acosta Tacos' unlawful conduct toward Chavez (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B); (3) disseminate Acosta Tacos' policy on sex and pregnancy discrimination prevention complying with California laws' requirements'; (4) develop a complaint procedure for violation of that policy; and (5) provide training on that policy and complaint procedure to all current supervisors within California. These policies should be in Spanish as well as English.

### ORDER

1. The accusation against Jaime Acosta is dismissed.
2. Respondent Jesus Acosta, as owner of Acosta Tacos and dba Acosta Tacos shall immediately cease and desist from denying any employee's right to a discrimination-free work environment based on sex or pregnancy under the Fair Employment and Housing Act.
3. Within 60 days of the effective date of this decision, respondent Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos shall pay to complainant Marina Chavez actual damages for lost back pay in the sum of \$21,645, together with interest thereon, at the rate of ten percent per year, compounded annually, from the date such wages would have accrued, until the date of payment.
4. Within 60 days of the effective date of this decision, respondent Jesus Acosta as owner and dba Acosta Tacos shall pay to complainant Marina Chavez compensatory damages for emotional distress in the sum of \$20,000, together with interest thereon, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.
5. Within 60 days of the effective date of this decision, respondent Jesus Acosta, as owner of Acosta Tacos and dba Acosta Tacos, shall pay to the state's General Fund an

administrative fine in the amount of \$5,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.

6. Within 60 days of the effective date of this decision, respondent Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos shall: develop and implement a written policy prohibiting sex and pregnancy discrimination in the workplace and disseminate that policy to all supervisors and employees in California; develop a complaint procedure for violation of that policy; and provide training on that policy and complaint procedure to all of his supervisors and employees within the State of California. This policy shall be printed in Spanish and English.

7. Within 10 days of the effective date of this decision, an authorized representative of respondent Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos, shall complete, sign where applicable, and post clear and legible copies of the notices conforming to Attachments A and B. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

8. Within 100 days after the effective date of this decision, respondent Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos, shall in writing notify the Department of Fair Employment and Housing and the Fair Employment and Housing Commission of the nature of its compliance with sections three through seven of this Order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: June 9, 2009

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ANN M. NOEL  
Administrative Law Judge

ATTACHMENT A

**ACOSTA TACOS**

NOTICE to EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION, an agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos violated the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.) on the basis of sex, by failing to reinstate an employee after she had taken a pregnancy disability leave; by terminating her employment; by retaliating against her; and by failing to take all reasonable steps to prevent discrimination from occurring. (*Dept. Fair Empl. & Hous. v. Acosta Tacos, et al* (2009) No. 09-\_\_\_\_.)

As a result of the violation, the Commission has ordered Jesus Acosta as owner of Acosta Tacos and dba Acosta Tacos to post this notice and to take the following actions:

1. Cease and desist from denying employees their rights to a discrimination-free environment based on sex and pregnancy under the Fair Employment and Housing Act.
2. Pay the employee lost wages, accrued vacation, and compensatory damages for emotional distress.
3. Provide training to its employees on sex and pregnancy discrimination prevention and rights to pregnancy disability leave under California law.
4. Post this notice for 90 days and permanently post a copy of Attachment B detailing employees' rights regarding sex and pregnancy discrimination.

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
[Authorized Representative]  
ACOSTA TACOS

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY

## ATTACHMENT B

### **NOTICE TO ALL EMPLOYEES OF ACOSTA TACOS**

#### **YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT**

**YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL DISCRIMINATION BASED ON SEX OR PREGNANCY. PREGNANT EMPLOYEES ALSO HAVE THE RIGHT TO BE GRANTED PREGNANCY DISABILITY LEAVE.**

The California Fair Employment and Housing Act (FEHA), prohibits discrimination against an employee on a number of protected bases, including sex and pregnancy.

**YOU HAVE THE RIGHT TO COMPLAIN ABOUT DISCRIMINATION AND GET RELIEF.**

**AS A PREGNANT EMPLOYEE, YOU ARE ALSO ENTITLED TO SUCH LEAVE FOR YOUR PREGNANCY AS YOUR MEDICAL PROVIDER DETERMINES, UP TO FOUR MONTHS.**

Under the FEHA, if you are disabled by pregnancy, childbirth or related medical conditions, you are eligible to take a pregnancy disability leave (PDL). If you are affected by pregnancy or a related medical condition, you may also be eligible for reasonable accommodation in your job or to transfer to a less strenuous or hazardous position or to less strenuous or hazardous duties. Taking a pregnancy disability leave may impact certain of your benefits and your seniority date. If you want more information regarding your eligibility for a leave, the impact of the leave on your seniority and benefits, and our policy for other disabilities, please contact \_\_\_\_\_.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such retaliation in employment. If you think you have been retaliated against for asserting protected rights under the Fair Employment and Housing Act, you may file a complaint with the Department at:

Department of Fair Employment and Housing  
1055 West 7th Street, Suite 1400  
Los Angeles, CA 90017  
(213) 439-6701 or (800) 884-1684  
[www.dfeh.ca.gov](http://www.dfeh.ca.gov)

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the discrimination stopped and can require your employer

ATTACHMENT B

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to reinstate you and to pay back wages, front pay and other out-of-pocket losses, damages for emotional injury, administrative fines, or punitive damages, and other appropriate relief.

DATED: \_\_\_\_\_ BY: \_\_\_\_\_  
Authorized Agent of Acosta Tacos

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.